Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-79

VERNON EDWARDS & ROBERT E. McCOY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a segment of time is excludable from the perimeters of the Speedy Trial Act when the trial court ignored the statutory criteria authorizing such exclusions and all reported cases explicitly adhere to those statutory guidelines, thus presenting a uniform conflict with the procedure approved of by the court of appeals herein.

REFERENCE TO THE OPINION BELOW

The opinion below styled *United States* v. *Edwards,* ____ F.2d ____ (D.C. Cir. May 29, 1980) has not yet been reported; it is reproduced in its entirety in Appendix A.

JURISDICTION OF THIS COURT

The judgment of the court of appeals was entered on May 29, 1980, and a Petition for Rehearing and Suggestion For Rehearing En Banc was filed on June 6, 1980 and denied on June 18, 1980. The time within which to file a petition for a writ of certiorari extends to and including July 18, 1980. Pending that filing the court of appeals, on our motion, stayed the mandate herein until after July 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 3161(h)(8)(A) of the Speedy Trial Act provides:

> "The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:"
>
> * * * *
>
> "Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. *No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.*
>
> (Emphasis supplied)

STATEMENT OF THE CASE

Petitioners and two others were charged in a two-count indictment with

(1) possession with intent to distribute phenmetrazine in violation of 21 U.S.C. 841(a), and

(2) unlawful possession of the same drug in violation of 33 D.C. Code 702.

On March 9, 1979, at approximately 12:30 a.m., two D.C. police officers were staked out on a motel parking lot looking for burglary suspects. A short time later a Volkswagen pulled onto the lot and parked followed by a Cadillac which parked next to it. Each vehicle contained a driver and one passenger. The officers next observed petitioner Edwards alight from the Volkswagen with a white shopping bag and enter the back seat of the Cadillac being driven by petitioner McCoy. The latter handed a large roll of money to petitioner Edwards who thereupon handed the shopping bag forward, counted the money and then returned to the Volkswagen. As both vehicles attempted to leave the parking lot they were stopped, the four occupants were arrested, and drugs and money were seized.

Petitioners were convicted of both charges and the other two defendants, Raymond T. Pearson and William H. Hall, were acquitted on both counts.

Upon the indictment's filing in open court on April 3, 1979, the trial judge scheduled the arraignment for April 17, 1979. On this latter date the trial was set for June 20, 1979, 64 days after the arraignment, in order to comply with the requirement of the Speedy Trial Act that the trial begin no more than 80 days after arraignment. See 18 U.S.C. 3161(g). The trial date was then postponed on three separate occasions resulting in a trial that began 125 days after the arraignment. The first continuance in itself — we allege — was unauthorized under the Speedy Trial Act, and thereby

caused a violation of that Act. Petitioner Edwards' written motion of August 1, 1979, — joined in by petitioner McCoy — to dismiss the indictment, outlined how this first continuance occurred:

> "The defendant Vernon Edwards along with his co-defendants was arraigned herein on April 17, 1979. Trial was set for June 20, 1979, 64 days after arraignment. Shortly before the trial date we were called by the courtroom clerk, Mrs. Frances Elliot, and advised that the Court had continued the trial to July 23, 1979, 97 days after arraignment — a violation of the 80 day rule contained in 18 U.S.C. §3161(g). A formal notice of this continuance was mailed to us on June 18, 1979. Vernon Edwards had no prior input into the continuance and we only learned later that it occurred because, on the original trial date of June 20, 1979, Assistant U.S. Attorney Roger Adelman was in trial in another court and that an attorney for a co-defendant, [later acquitted] John Hurley, Esq., was ill. . . ."

Accordingly, it has remained undisputed throughout these proceedings that the *sua sponte* continuance that propelled the trial past the 80 day limit then in effect did not, in any fashion, comply with the "ends of justice" exclusionary requirements contained in 18 U.S.C. 3161(h)(8)(A).

However, it is a later status call held on July 25, 1979, upon which respondent and the court of appeals relied in concluding that the trial court validly and retroactively excluded the first continuance from the rigorous time frame of the Speedy Trial Act.

JULY 25, 1979 STATUS CALL

After co-defendant Raymond Pearson's [later acquitted] original trial counsel died, the court scheduled a status call for July 25, 1979, attended by Pearson, a prosecutor, and prospective new counsel, Philip Stein, Esq. Neither of the

petitioners nor their counsel was present. During the course of that hearing designed to acquaint prospective counsel for Pearson with the case and to determine if he would enter his appearance, the court observed the following *inter alia*:

> ". . . We have postponed this trial twice now. [On the first occasion] Mr. Hurley [counsel for an acquitted co-defendant] was sick; Mr. Adelman [prosecutor] was in Berlin,[1] we have had all sorts of problems." (July 25, Tr. 6)

It is *solely* and *exclusively* upon this brief transcript reference made some five weeks after the continuance at issue that respondent and the court of appeals relied upon in concluding that the stringent requirements of 18 U.S.C. 3161(h)(8)(A), had thus been fully complied with.

REASONS FOR GRANTING THE PETITION

At bottom, the instant case is important because the mandatory dismissal sanction of the Speedy Trial Act became operational once more on July 1, 1980—18 U.S.C. 3163(c)—and proper statutorily authorized exclusions of time are vital for the government to avoid the potent dismissal sanction.[2] Furthermore, the "ends of justice"

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[1]This was an erroneous recollection by the court as conceded in respondent's brief below at page 5. In fact, the prosecutor was in trial before another judge in the courthouse at the time and not in Berlin.

[2]The case at bar presented some difficult questions for the court of appeals because on July 1, 1979, the mandatory dismissal sanction of the Speedy Trial Act became operational and was in force for 32 days until August 2, 1979, when the President signed legislation tolling its effect until July 1, 1980. The instant case was tried on August 20, 1979, some 125 days after arraignment. Because oral and written motions to dismiss the indictment were made and denied between July 1 and August 1, 1979—alleging trial delays beyond the 80 day limit—the mandatory dismissal sanction, we urged, required the relief sought. The court of appeals avoided this issue "not without difficulty" App. 5a, by holding the Act was not violated.

exclusion herein considered is the most general and widely used by all of the district courts. The court of appeals interpretation of 18 U.S.C. 3161(h)(8)(A) is absolutely erroneous and conflicts with the proper procedure to be followed that appears in every reported federal case.

A. The opinion below is erroneous because it authorizes the validation of an exclusion of time *nunc pro tunc* after the Speedy Trial Act had already been violated. Even assuming that a district court can comply with 18 U.S.C. 3161(h)(8)(A), after it grants a continuance, we submit that it cannot validly do so five weeks after the continuance, 99 days after the arraignment and thus 19 days after the 80 day time limit of the Speedy Trial Act had already been exceeded. In these circumstances the district court was without the power to retroactively validate the violation.

> "This section of the Act [3161(h)(8)(A)] certainly does not permit this court to grant a continuance *nunc pro tunc.* This has to be the case since we are dealing with a clear line of time — much like a statute of limitations — marked for prophylactic purposes, not to be analogized to the equitable doctrine of laches." *United States* v. *LaCruz,* 441 F. Supp. 1261, 1264-5 (S.D.N.Y. 1977)

B. The opinion below is erroneous and conflicts with every other reported case in that it authorizes an exclusion of time without even a scintilla of compliance with 18 U.S.C. 3161(h)(8)(A). Although the statute mandates that no period of delay shall be excludable under this section unless the court "sets forth in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial," the district court herein made no such finding. The court's off-the-cuff remark to prospective new counsel for Pearson was obviously only intended to be part of an outline of the progress of the case for his benefit and not a statement of

reasons required by the statute. Nor can that remark be interpreted as such when it does not even remotely allude to any balancing of competing interests in granting the continuance or the reasons why, if any, the ends of justice would be served thereby. Absent this pointed on the record appraisal by the trial court, meaningful appellate review of the validity of the continuance is illusory and accordingly, the time cannot be excluded under the Act.

Furthermore, every judicial interpretation of the section in question supports our position and conflicts with the court below.

> A trial court finding that "the ends of justice served by granting a 60-day continuance outweigh the best interest of the public and the defendant[s] in a speedy trial" was warranted by the facts. *United States* v. *McGrath,* 613 F.2d 361, 366, (2d Cir. 1979)
>
> The trial court continued the case after an extensive hearing. "The Speedy Trial Act permits such continuance when the court finds that the ends of justice being served by such delay outweigh the defendant's interest in a speedy trial. 18 U.S.C. §3161(h)(8)(A)." *United States* v. *Richman,* 600 F.2d 286, 293 (1st Cir. 1979).
>
> "Section 3161 (h)(8)(A) requires that for a continuance to constitute excludable delay, the court must explicitly find that 'the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.' " *United States* v. *Morales,* 460 F. Supp. 668, 670 (E.D.N.Y. 1978)

Accord: *United States* v. *Flood,* 462 F. Supp. 99, 102 (D.C.D.C. 1978) (specific finding re the ends of justice plus reasons in support thereof.); *United States* v. *Tussell,* 445 F. Supp. 1 (M.D. Penn. 1977) ("I find that the 'ends of justice. . .>" in the circumstances presented warrant excluding the time); *United States* v. *Mannino,* 480 F. Supp. 1182 (S.D.N.Y. 1979) (After a review of facts, the court specifically finds that the "ends of justice" would be served by

excluding the time pursuant to 18 U.S.C. 3161 (h)(8)(A).)

The court below, without alluding to any operative facts on citing one single case concluded:

> "There is no question that at the status hearing on July 25, the trial court made clear on the record its reasons for the first continuance. There is no question that those reasons were valid and well within the discretion afforded by the Court by the exclusionary language referred to above." Appendix 4a.

The court has erroneously supposed that 18 U.S.C. 3161 (h)(8)(A) has been complied with merely because the reasons for the continuance could have passed muster — this is a far cry from the actual compliance required and a situation alluded to by Congress when it suspended the mandatory dismissal sanction until July 1, 1980:

> "[E]xperience. . .suggests that the provisions of the Act were not being fully implemented. This was particularly true of. . .section 3161(h)(8), relating to 'ends of justice' continuances. As a result many cases that were exceeding the time limits of the Act could have been brought into compliance by the use of [these] provisions. . . ." H.R. Rep. No. 390, 96th Cong. (1979), U.S. Cong. & Admin. News 1979, p. 1754.

Now that the mandatory dismissal sanction is finally operative, an even greater degree of litigation will be spawned by the Speedy Trial Act than before. 18 U.S.C. 3161 (h)(8)(A), is the most widely used provision to exclude time periods under the Act. To forestall much of this litigation and to resolve the apparent conflict of interpretation that the instant case has generated, we believe that this petition should be granted so that all parties involved in federal criminal litigation will fully understand that the section under review means exactly what it says and that its requirements must be fulfilled before exclusions of time are valid.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2251

UNITED STATES OF AMERICA

v.

VERNON EDWARDS, APPELLANT

No. 79-2252

UNITED STATES OF AMERICA

v.

ROBERT E. MCCOY, APPELLANT

Appeals from the United States District Court for the District of Columbia

(D.C. Criminal No. 79-00165)

Argued February 26, 1980

Decided May 29, 1980

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Allan M. Palmer with whom *William E. Reukauf* was on the brief, for appellants.

Benjamin B. Sendor, Assistant United States Attorney with whom *Charles F. C. Ruff*, United States Attorney, *John A. Terry*, *Michael W. Farrell*, *H. Lowell Brown* and *Roger M. Adelman*, Assistant United States Attorneys were on the brief, for appellee.

Before: TAMM, MACKINNON and MIKVA, *Circuit Judges*

Opinion Per Curiam.

The only issue on appeal is whether or not the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-74 (1976), has been violated by the action of the trial court. For reasons set forth below, we find there has been no violation and the convictions are affirmed.

The appellants and two others were arraigned on various narcotics charges on April 17, 1979. The trial was set for June 20, 1979, 64 days from the day of arraignment. The date was set in order to comply with the requirement of the Speedy Trial Act that the trial begin no more than 80 days from the date of arraignment. *See* 18 U.S.C. § 3161(g). That trial date was postponed on three separate occasions. As a result of these continuances, the trial, in fact, began 125 days after the arraignment.

In passing the Speedy Trial Act, Congress recognized the need to provide flexibility to permit a trial court to coordinate the schedules of multiple defendants and their counsels. Two of the exclusions to the 80-day rule specifically provided within the Act are especially relevant to that situation. Under 18 U.S.C. § 3161(h)(8), for example, a court shall exclude:

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

Also, under 18 U.S.C. § 3161(h)(7), a court shall exclude:

> [a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

The exclusion under 18 U.S.C. § 3161(h)(7) is crucial in a case involving multiple defendants because it provides that an exclusion applicable to one defendant applies to all codefendants.

All three of the continuances granted by the trial court clearly fall within one or the other of the quoted exceptions. Indeed, appellants do not really contend that the second and third continuances had any defects. Their argument is based wholly on the first continuance in the case. That first continuance, from June 20 to July 23, was granted by the trial court after it was informed that counsel for one of the subsequently acquitted codefendants was ill and that the prosecutor had a conflicting trial schedule. The court noted these two reasons for the continuance during a later status call, held on July 25. The gist of appellants' argument is that this continuance was granted *sua sponte* by the court and no contemporaneous record was made of the reasons for it. We think neither of these arguments render the exclusionary language inoperative.

Section 3161(h)(8)(A) clearly empowers the judge to grant a continuance "on his own motion" if he finds that the "ends of justice" so require. The section further pro-

vides that any delay resulting from such a continuance shall be excluded from the computation of trial delays so long as the trial court "sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." *Id.* In the case under review, the reasons for the judge's action were articulated on the record at a subsequent hearing. We find nothing in the statute which requires such findings be placed on the record exactly at the time that the continuance was granted. Nor is there any way the purpose of the statute would be served by such a requirement. There is no question that at the status hearing on July 25, the trial court made clear on the record its reasons for the first continuance. There is no question that those reasons were valid and well within the discretion afforded the court by the exclusionary language referred to above. To hold that the Speedy Trial Act requires a dismissal of the indictments against these two appellants solely because the trial judge failed to record his findings concomitantly with his order would be to fashion the Speedy Trial Act into a snare. That result cannot fairly be attributed to the spirit of the Act or the well-motivated goals that Congress had in mind.

Appellants also claim that the Speedy Trial Act was violated because the arraignment was held 14 days after the indictment was filed, four days later than that permitted by the Act. *See* 18 U.S.C. § 3161(b). However, even these four days would not bring the total time outside the allowed period unless one or more of the continuances were inoperative to extend the 80-day period. Nothing in the Act suggests that the 10-day period set forth for arraignment is in itself a ground for bringing the mandatory dismissal provisions of the Act into play.

Appellees argue vigorously that the dismissal sanctions of § 3162 were postponed by the 1979 amendment of the Act, P.L. 96-43, § 6, 93 Stat. 328 (1979) (effective Aug. 2, 1979), and that even if the Act had been violated in this case, no dismissals should be granted. The legislative dilemma created by the timing and substance of the 1979 amendment postponing the effective date of the § 3162 sanctions is not without difficulty. However, in light of our holding that the Act was not violated, those arguments and concerns need not be addressed.

For the reasons stated, the judgment of the District Court is

Affirmed.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

At page 8 of the petition we indicate that with the rebirth of the mandatory dismissal sanction as the penalty for violation of the Speedy Trial Act, "an even greater degree of litigation

will be spawned by the . . . Act than before." We also stated at page 5-6, that the instant case has far ranging importance because, the "ends of justice" time exclusion herein considered is the one most often used by the district courts to avoid operation of the potent dismissal sanction.

Our correct anticipation of litigation is borne out by the following Speedy Trial Act cases reported since the filing of the petition herein:

United States v. Berkwitt, 619 F.2d 649 (7th Cir. 1980) (Dismissal sanction considered);

United States v. Vanella, 619 F.2d 384 (5th Cir. 1980) (Dismissal sanction considered);

Government of Canal Zone v. Martinez H., 620 F.2d 502 (5th Cir. 1980) (Dismissal sanction considered);

United States v. Greer, 620 F.2d 1383 (10th Cir. 1980) (Dismissal sanction considered);

United States v. Anderson, 621 F.2d 292 (8th Cir. 1980) (Speedy Trial Act and Sixth Amendment considered);

United States v. Hill, 622 F.2d 900 (5th Cir. 1980) (Dismissal sanction considered);

United States v. McGrath, 622 F.2d 36 (2d Cir. 1980) (Dismissal sanction considered);

United States v. Aviles, 623 F.2d 1192, 1195 (7th Cir. 1980) (". . . Speedy Trial Act permits a trial court to grant a continuance if it does so *based on a finding* that the ends of justice . . . outweigh the best interests of the public and the defendant in a speedy trial. 18 U.S.C. §3161(h)(8)(A)");

United States v. Watson, 623 F.2d 1198 (7th Cir. 1980) (Dismissal sanction considered).

Although the Government has opted for the tactic of

remaining silent by waiving its right to file a response to the instant petition, unless requested to do so by the Court, it is our considered judgment that any such requested response would result in a confession of error.

Respectfully submitted,

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